

MCLE: NETIQUETTE VS. CYBER ETHICS

By Carole Levitt & Mark Rosch

Most attorneys are familiar with the term “Netiquette”—guidelines for proper behavior in the world of cyber communication. Cyber communications that fall within these guidelines mostly refer to e-mails, discussion groups, or chat. Some well-known netiquette guidelines are: (1) avoid flaming (but if you must, use a “Flame On/Flame Off” warning); (2) watch your tone of voice (some people use a smiley face to show they are joking or <g> to indicate “grin”); (3) use abbreviations (e.g. IMHO—“In my humble opinion”) and (4) respect others’ time and bandwidth by using descriptive subject lines and by not sending the same e-mail multiple times to the same discussion group and so on). For more Netiquette guidelines, see the online version of “Netiquette” by Virginia Shea (www.albion.com/netiquette/book/index.htm).

The A.B.A. and various state bar associations, in the meantime, have been adding to the concept of netiquette by writing ethical opinions or creating new ethical rules about proper cyber communication behavior. While the above netiquette guidelines that were crafted for the general public are voluntary, the more specific opinions and rules crafted for attorneys are not. In addition to the cyber communications noted above, the rules and opinions geared to attorneys can also apply to the following cyber communications: websites (and now probably blogs), domain names, e-mail addresses, and online articles. Ethical opinions and rules that relate to these various forms of cyber communication will be collectively referred to as “Cyber Ethics.”

Is your website ethical?

As early as 1996, many State Bars began issuing opinions about ethical issues involv-

ing the use of the Internet. But they primarily focused on websites only and not the entire gamut of cyber communications. The California State Bar did not issue its first Formal Opinion about the Internet and ethics until 2001 and then only addressed one aspect of cyber communication and ethics: website ethics. The principles behind the website ethics opinion can probably be applied to other cyber communications because the opinion basically superimposed the current advertising rules for print, radio and television upon websites.

The California State Bar Association Standing Committee on Professional Responsibility & Conduct’s (COPRAC) Formal Opinion No. 2001-155, deals specifically with the ethical issues attorneys must address when creating and displaying Internet websites relating to their law practice (www.calbar.org/2pub/3eth/ca2001-155.htm). The specific issue addressed by COPRAC was “What aspects of professional responsibility and conduct must an attorney consider when providing an Internet website containing information for the public about her availability for professional employment?”

Websites are “communications” and “advertisements” but not “solicitations”

In a nutshell, the Opinion views websites as a “communication” under rule 1-400(A) of the California Rules of Professional Conduct and an “advertisement” under Business and Professions Code sections 6157 to 6158.3. Consequently, the text and the images and sounds on an attorney’s website cannot be

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false, misleading, or deceptive. Surprisingly, websites are not considered to be a “solicitation” under rule 1-400(B), even in a situation where a potential client can e-mail a specific attorney directly from the website. Just because e-mails can be transmitted over phone lines, the communication does not resemble a phone discussion between an attorney and potential client for solicitation purposes because “the static nature of the e-mail allows a potential client to reflect, re-read and analyze” and to basically take the time to decide whether to enter into an attorney-client relationship. In contrast, over the phone, a potential client is subject to an attorney’s persuasiveness and may feel pressured to make a quick decision without reflecting.

The only time a website could even be remotely considered a solicitation is if a visitor to a website e-mailed an attorney and the attorney responded even though the attorney knew the visitor was already represented by counsel.

Just as attorneys may be feeling a sense of relief as they read the Opinion because they now have a grasp of what is and is not allowable on their website, they are warned that their website might be subject to another jurisdiction’s regulations and may violate that jurisdiction’s rules or even be considered the unauthorized practice of law in that jurisdiction.

Making sure your website complies with other states’ ethics rules:

To avoid violating another jurisdiction’s rules or facing an unauthorized practice of law charge, COPRAC

an office, and in which courts the attorney is willing to appear. Even with these precautions, California attorneys licensed in another state or who have offices in another state, may still may be subject to that state’s website rules. For this reason, even if your firm does not have an out-of-state office, it would be wise to find out if anyone in your office is licensed outside of California and review those states’ rules. Most of the rules will be found in the states’ ethics rules relating to attorney advertising, solicitation and marketing. For links to each states rules, see www.abanet.org/legal_services/clientdevelopment/adrules.html.

Do unencrypted e-mails violate any cyber ethics rules?

Because the COPRAC opinion only focused on website ethics, California attorneys may find it helpful to look to the A.B.A. and other states for specific cyber ethics guidance. For example, California attorneys who wonder if sending an unencrypted e-mail to a client would violate any confidentiality rules can probably rely upon the A.B.A.’s Formal Opinion 99-413, holding that sending unencrypted e-mail would not violate the Model Rules of Professional Conduct (1998). Because it is possible that an unencrypted e-mail can be intercepted, as with any confidential communication, you and your client should agree in advance as to how to communicate.

Is your domain name ethical?

Although the COPRAC Opinion does not address whether an attorney’s domain name or e-mail address is also a “communication” or “advertising,” other states have addressed this question in the affirmative. In Arizona, State Bar Opinion 2001-05 deals squarely with the ethics of a domain name. While a firm’s domain name does not have to be identical to the firm’s actual name, it must not be false or misleading, imply any special competence or unique affiliations unless factually true (www.azbar.org/EthicsOpinions/Data/01-05.pdf). The Opinion concludes that a for-profit law firm domain name should not use the “.org” suffix, or use a domain name that implies that the law firm is affiliated with a particular non-

CALIFORNIA ATTORNEYS LICENSED IN ANOTHER STATE OR WHO HAVE OFFICES IN ANOTHER STATE, MAY STILL MAY BE SUBJECT TO THAT STATE’S WEBSITE RULES.

suggests that attorneys use a disclaimer on their site stating that they are advertising only in California and that they do not seek to represent someone based solely on that person’s visit to their website. The disclaimer should include a statement about where the attorney is licensed, actually practices and maintains

profit or governmental entity. Thus, a private firm's request to call itself "arizona attorney.org" was rejected.

It is possible that California would also be in agreement if put to the test. For example, if a private California attorney wanted to use the domain name "californialawyer.org," this may be considered unethical under Business & Professions Code §6157.1 (which prohibits false or misleading advertising). Would a bankruptcy attorney's domain name, "payno-bills.com" pose any ethical problems under Section 6157.1? Possibly, if it misleads a bankruptcy client who is re-organizing (instead of one who is declaring straight bankruptcy) that they need not pay any bills. Or, an attorney who uses the domain name "thebestattorney.com" or "thebestresultsattorney.com" may be considered unethical under Business & Professions Code §6157.2 (which prohibits any guaranty of outcome). It is possible that the more naïve consumer may assume that an attorney with this domain name is promising to be the best or is guaranteeing to get the best results.

Creating the domain name "bestlemonlaw attorney.com" may violate ABA Model Rule 7.1 (which prohibits using superlatives to distinguish your firm from another's, short of factual proof). Although California does not follow the ABA rules of professional conduct, a California attorney who also maintains an office outside of California might be subject to the ABA rules since so many states do follow the ABA rules.

Is your website content ethical?

A.B.A. Model Rule 7.1 also prevents attorneys from creating unjustified expectations about results as does California Professional Responsibility Rule 1-400, Standard 1, which prohibits "A 'communication' which contains guarantees, warranties, or predictions regarding the result of the representation." Thus, advertising past client successes on an attorney's website may be deemed unethical as it may indicate to a potential client that he or she can expect like results. Personal injury attorneys who detail past successes and even advertise the damage award may want to take a second look at this part of their site or add a disclaimer that every case is different and may not result in the same

award as past clients (or may not even result in a verdict in the client's favor).

Are the images on your website ethical?

What type of images on an attorney's website could be considered unethical? Placing a picture of a person on your site that implies that the person is either a member of your firm or is an actual client, when in fact they are not, may be considered misleading. This would violate Standard 13 of California Professional Responsibility Rule 1-400, unless you labeled the photograph as a dramatization.

Have you been retaining copies of your old web pages?

Most attorneys do not realize that Rule 1-400(F), which dictates that attorneys retain copies or recordings for two years of any communications they have made by written or electronic media, applies even to their website and any revisions of their site. For those who have not

ADVERTISING PAST CLIENT SUCCESSES ON AN ATTORNEY'S WEBSITE MAY BE DEEMED UNETHICAL AS IT MAY INDICATE TO A POTENTIAL CLIENT THAT HE OR SHE CAN EXPECT LIKE RESULTS.

kept copies of earlier versions of their sites, the omission might be rectified with a visit to the Internet Way Back Machine. This Internet archive, dating back to 1996, recently made its collection of outdated web pages available to the public (see www.netforattorneys.com/wayback.htm for more details).

Other cyber communications

Since websites are considered communications and advertisements, it is likely that other online communications would be too. Thus, attorneys need to consider what other online communications could also pose ethical problems besides ones relating to their online website. For example, many attorneys send e-mail invitations for seminars or e-mail newsletters to update the recipient about a certain area of law. Should they label the e-mail as "Advertisement" or "Newsletter" in the

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subject line? Probably yes, if one compares e-mails to the regular mail. For example, under Standard 5 of California Professional Rule 1-400, attorneys are instructed that “[n]ewsletters, recent legal development advisories, and similar materials..., transmitted in an envelope..., shall bear the word ‘Advertisement,’ ‘Newsletter’ or words of similar import on the outside thereof.” Thus, a cautious California attorney would also now apply Rule 1-400 to e-communications. In Tennessee, an attorney was disbarred when he e-mailed an advertisement about the firm’s immigration services to thousands of Internet groups and e-mail lists without the words: “This Is An Advertisement” that were required by the Tennessee State Bar (www.legalethics.com/articles.law?auth=canter.txt). He also violated several other professional responsibility rules in this same matter.

Do cyber ethics apply to e-mail signatures and tag lines?

Does an attorney need to be concerned about applying cyber ethics rules to their e-mail signature line or tag line (e.g. a tag line that says “King of Torts” or “Best Attorney”)? If it includes anything that could be interpreted as “false, deceptive, or which tends to confuse, deceive, or mislead the public,” the answer is probably yes. Review your signature line (or tag line), and consider whether it needs changing.

Do you solicit prospective clients through internet chat rooms?

Do you give legal advice in chat rooms or in discussion groups or have you tried to solicit clients via chat rooms? The Florida Bar Standing Committee On Advertising held that “An attorney may not solicit prospective clients through Internet chat rooms, defined as real time communications between computer users” (www.flabar.org/newflabar/memberservices/Ethics/A-00-1.html).

Can your cyber communications ever result in charges of unauthorized practice of law or malpractice?

Have you published an article that is being disseminated online, with or without your knowledge? Do you participate in online communications such as

discussion groups (via e-mail to a list serve), blogs, or chat rooms? What if someone outside of (or even within) California reads your article or any of your other online writings and then relies upon the information to their detriment? Are you liable for the unauthorized practice of law as to out-of-state consumers or for malpractice as to in-state (or out-of-state) consumers. Don’t you have a constitutional right to express your opinions? In the case of an article, you are probably within your rights, but the answer gets grayer once you begin expressing your opinion in a chat room or discussion group if the communication is two-way.

Although the COPRAC opinion is advisory only (and thus not binding on the courts, the State Bar, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar), you can be sure of its persuasiveness in a court of law.

For those who wish to test their understanding of the COPRAC Formal Opinion on websites and other cyber ethics guidelines, and also earn an hour of MCLE credit in Ethics, try your hand at the following quiz (FREE to LPMT members). To insure that your own website is ethically compliant, it would behoove you to review your website after reading this article (and you might also consider reading the Formal Opinion in its entirety and reviewing all the professional rules and Business & Professions Code sections noted in this article that pertain to websites).

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QUESTIONS: NETIQUETTE VS. CYBER ETHICS

1. According to Formal Opinion 2001-155, an attorney website constitutes a "communication" as defined under rule 1-400(A) of the California Rules of Professional Conduct.

True False

2. According to Formal Opinion 2001-155, an attorney website does not constitute an "advertisement" as defined under Business and Professions Code sections 6157 to 6158.3.

True False

3. According to Formal Opinion 2001-155, an attorney website constitutes a "solicitation" as defined under rule 1-400(B) of the Rules of Professional Conduct simply if the website includes the ability for a visitor to e-mail a specific attorney.

True False

4. Formal Opinion 2001-155, citing rule 1-400(F) of the Rules of Professional Conduct, instructs attorneys that they should keep copies of each page of their website for two years.

True False

5. Formal Opinion 2001-155 instructs that it is permissible for an attorney website to present a "guaranty [sic] of outcome" as part of its message.

True False

6. Formal Opinion 2001-155 also states that because "e-mail is transmitted via telephone lines, it is to be treated as any other phone communication as defined under rule 1-400(B) [of the Rules of Professional Conduct]."

True False

7. To avoid having your website appear as if you are practicing law in jurisdictions where you are not licensed, the Formal Opinion suggests including an explanation of where you are licensed to practice law.

True False

8. To avoid having your website appear as if you are practicing law in jurisdictions where you are not licensed, the Formal Opinion suggests including a description of where you maintain law offices and actually practice law.

True False

9. To avoid having your website appear as if you are practicing law in jurisdictions where you are not licensed, the Formal Opinion suggests including a copy of your license to practice law.

True False

10. To avoid having your website appear as if you are practicing law in jurisdictions where you are not licensed, the Formal Opinion suggests including an explanation of any limitation to courts in which the attorney is willing to appear.

True False

11. To avoid having your website appear as if you are practicing law in jurisdictions where you are not licensed, the Formal Opinion suggests including a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney's website.

True False

12. Formal Opinion 2001-155 recognizes that its suggestions may not meet the requirements set out by authorities regulating the practice of law in other jurisdictions. The Formal Opinion, however, counsels that attorneys licensed only in California should not concern themselves with the requirements of any other jurisdictions, since only an entity that has physically issued a license to a specific attorney (to practice law) shall have any jurisdiction over that attorney's actions.

True False



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QUESTIONS: NETIQUETTE VS. CYBER ETHICS

13. Formal Opinion 2001-155 is binding on all members of the California State Bar and enforceable by the courts.

True False

14. Formal Opinion 2001-155 is only "persuasive" authority.

True False

15. The text on an attorney's website cannot be false, misleading, or deceptive, but the images and sounds can be.

True False

16. Attorneys whose marketing includes mailing newsletters to update the recipient about a certain area of law are instructed to label the envelope as "Newsletter" according to Standard 5 of Rule 1-400. Thus, it would probably be prudent to label the Subject Line of an email in the same manner if an attorney begins to e-mail his or her newsletter.

True False

17. If a California attorney looked to The Florida Bar Standing Committee On Advertising for guidance about soliciting prospective clients through Internet chat rooms, the attorney would decide it was prudent not to solicit prospective clients through Internet chat rooms.

True False

18. You would never be liable for the unauthorized practice of law if an out-of-state consumer relied upon your legal advice offered in a chat room.

True False

19. You would never be liable for malpractice to an in-state consumer if he or she relied, to their detriment, upon legal advice you had offered in a chat room.

True False

20. If someone within California reads an article that you published online you have now entered into an attorney-client relationship.

True False

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